No. 18,905

United States Court of Appeals

For the Ninth Circuit

KANSAS CITY FIRE AND MARINE INSURANCE COMPANY, a corporation,

Appellant,

vs.

WAYNE A. CLARK, THE MONTANA POWER COMPANY, a corporation, LEW CHEVROLET COMPANY, a corporation, and CLARENCE G. MADSEN,

Appellees.

OPENING BRIEF OF KANSAS CITY FIRE AND MARINE INSURANCE COMPANY, Plaintiff and Appellant, on Its Appeal From Judgment in Favor of Defendants.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

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OPENING BRIEF OF KANSAS CITY FIRE AND MARINE INSURANCE COMPANY, Plaintiff and Appellant, on Its Appeal From Judgment in Favor of Defendants.

A. Statement of the pleadings and facts disclosing the basis of jurisdiction.

This is an action for declaratory relief involving diverse citizenship and a matter in controversy exceeding the sum of $10,000.00 exclusive of interest and costs. (Complaint, paragraphs I and II; Transcript of Record, Vol. I, pages 1-2.)

The statutory provision believed to sustain the jurisdiction is 28 U.S.C.A., sec. 1332.

The statutory provision believed to sustain the jurisdiction of the Court of Appeals is 28 U.S.C.A., sec. 1291.

B. Statement of the case.

Wayne Clark was a private pilot with a limited certificate. He desired instruction in order to obtain a commercial license. For this purpose he arranged with Al Forhart for a course of training and paid $1,500 on account of tuition charge. (T.R. 39:16-32.)[1]

Clark's occupation was sales manager for defendant Lew Chevrolet Company located at Billings, Montana. He received a telephone call from Red Lodge, Montana. The substance of the call was that a Mr. A. M. Sheffield had wrecked his automobile and wanted to buy a Chevrolet but none was available in Red Lodge. (T.R. 40:15-19.)

Clark informed Forhart that he had an opportunity to go to Red Lodge and that he would like to get a little flying time. Forhart agreed. (R. 28:2-10.) Otherwise, Clark would have used other means of transportation. (R. 27-8.) Nothing was said about transporting passengers on the return trip. (R. 28:8-16.)

Clark was accompanied on the flight by Clarence Madsen, also an employee of Lew Chevrolet Co. (T.R. 25:13-17.) The distance traveled was sixty miles. On landing in Red Lodge he took on board Mr. Sheffield and his son Darrell, with the result that the plane was carrying four persons making a load of 866 pounds. This was within

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[1]References to Volume One of the Transcript of Record containing the pleadings, findings, opinion and judgment will be identified by the initials T.R. References to Volume Two containing the transcript of the trial will be identified by the initial R.

34 pounds of its maximum useful load. (R. 29-30.) In the course of take-off the plane struck power wires belonging to the Montana Power Co. and crashed. (T.R. 26:15-18.) The Sheffields made a claim for personal injuries against Clark and his employer, Lew Chevrolet Co. Madsen, Clark's co-employee, made a claim against Clark for personal injuries. Montana Power Co. made a claim for damage to its property.

Forhart carried insurance issued by the plaintiff. The policy contained provisions amplifying the identity of those who were insured by it and also stipulations as to permitted uses.

The Insurance Company commenced suit for a declaratory judgment that Clark was not insured; that the use of the plane by Clark was not one which was permitted under the policy and that the company was not liable to pay any judgment that might be rendered against Clark or the Chevrolet Company.

The learned District Judge decided that Clark and his employer, Lew Chevrolet Co., were insureds under the policy; that the insurance company was obligated to defend and to pay any judgment based on the claims of the Sheffields, Madsen, and Montana Power Co. against Clark or Lew Chevrolet Co., or both. Judgment was entered accordingly.

Thus, not only is Clark held to be an insured; but his employer, whose only basis of liability is that Clark was acting in the scope of his employment, is also an insured; and finally, the insurance company is held liable for the injuries of Madsen, a co-employee of Clark. From this

extraordinary outcome the insurance company has appealed.

C. Statement of questions involved and the manner in which they are raised.

The questions involved are the following:

(1) Were the defendants or any of them within the category of "insured" as that term is defined in the policy of insurance?

(2) Under the terms of the policy was the use of the airplane at the time of the crash one which was permitted and under the circumstances of the flight was Clark a permitted pilot?

The manner in which the foregoing questions are raised is by objection to the findings of fact, conclusions of law and judgment, and the contention of appellant insurance company that the foregoing questions should have been decided in its favor and judgment rendered accordingly.

D. Specification of errors.

(1) Error in failing to decide that none of the defendants is an insured under the policy involved in this action.

(2) Error in failing to decide that at the time of the occurrence which resulted in injuries and damage to third parties, defendant Clark was operating the aircraft under the terms of a training program which provided remuneration to Forhart, the insured, and therefore neither Clark nor his employer, Lew Chevrolet, is an insured.

(3) Error in failing to decide that appellant is not liable for the conduct of Clark in piloting said aircraft at the time of said occurrence.

(4) Error in failing to decide that at the time of said occurrence said aircraft was being used for a purpose not permitted by the terms of said policy.

(5) Error in failing to decide that at said time said aircraft was being operated by a pilot not permitted under said policy.

(6) Error in failing to decide that at said time said aircraft was being operated for the business of Clark and Lew Chevrolet Co.

(7) Error in failing to decide that at said time the operation of said aircraft was not under the direct supervision and control of a properly certificated instruction pilot and that Forhart, the instructor, had no knowledge concerning the business purpose of the flight or that Clark was carrying three passengers.

(8) Error in finding that Clark was a pilot contemplated and authorized by General Endorsement No. 3 and/or item 7 of the Declarations as set forth in Part A of Endorsement No. 3. (T.R. 65-6.)

(9) Error in finding that the use which Clark was making of the aircraft was a use contemplated in Item 6 of the Declarations in the policy when construed with paragraph A of Endorsement No. 3. (T.R. 66:2-3.)

(10) Error in finding that the use and operation of said aircraft was not under the terms of a training program which provided remuneration to Forhart; and that Clark was not engaged in any training program contemplated by the provisions of the policy. (T.R. 66:11-19.)

(11) Error in finding that that the time of the crash Clark was under the direct supervision and control of Forhart. (T.R. 61:19-20.)

(12) Error in finding that plaintiff has admitted coverage for Forhart. (T.R. 62:20-21.)

(13) Error in failing to find that none of the defendants was a person insured under said policy and in failing to find that at the time of said occurrence the use of the airplane was one which was not permitted by the policy; and that at said time the airplane was being used for business and was operated by a person not permitted by the policy.

(14) Error in concluding that Clark and any person or organization legally responsible for his use and operation of the aircraft were "insureds" under the terms of said policy. (T.R. 67:14-20.)

(15) Error in concluding that under the terms of said policy plaintiff is obligated to furnish to Clark and Lew Chevrolet Co. a legal defense to the actions filed against them by A. M. Sheffield, Darrell Sheffield, Clarence G. Madsen and Montana Power Co. (T.R. 67:21-5.)

(16) Error in concluding that up to the limits of the policy plaintiff is obligated to pay any judgment that may be rendered in favor of A. M. Sheffield, Darrell Sheffield, Clarence G. Madsen and Montana Power Co. against Clark and Lew Chevrolet Co. (T.R. 67:26-32.)

(17) Error in concluding that defendants are entitled to judgment.

(18) Error in failing to conclude that plaintiff is entitled to judgment.

(19) Error in granting judgment in favor of defendants as set forth in the judgment on file herein. (T.R. 69-70.)

(20) Error in failing to give judgment in favor of plaintiff.

E. Summary of Argument.

(1) The policy of insurance contains a "Definition of Insured". This is extended so as to include others than the "Named Insured" (Forhart) but the provision does not apply to "any person operating the aircraft under . . . any training program which provides any remuneration to the Named Insured for the use of said aircraft". Clark was operating the aircraft under such a training program. Therefore, he is not covered and the insurance company was not obligated to defend him or his employer, Lew Chevrolet Co., against the claims based on Clark's alleged negligent conduct.

This proposition suffices to dispose of the case. It entitles the insurance company to the declaratory relief which it seeks and requires a reversal of the judgment of the District Court.

(2) Furthermore, assuming that by any stretch of reasoning Clark could be regarded as an insured, his flight was not under the direct supervision and control of his instructor and therefore, his use of aircraft at the time of the occurrence was not one which was permitted by the policy, but on the contrary, was a use to which the policy by its express provisions did not apply.

Thus, for two independent reasons the insurance company is not obligated to defendant Clark, or his employer, Lew Chevrolet Co., nor to pay any claim asserted against them.

ARGUMENT

1. **This aircraft insurance policy contains separate and independent provisions as to (1) the identity of those who are included in the category of the term "insured"; and (2) the uses of the aircraft which are permitted as the basis of liability. These two aspects must not be confused.**

Paragraph I of the "Insuring Agreements" sets forth the obligation of the company to pay on behalf of the "Insured" all sums which the Insured shall be legally obligated to pay as damage because of bodily injury. The policy (Par. III of Insuring Agreements) contains a definition of the word "Insured" and states that "the provisions of this paragraph do not apply:

* * * * * * *

(d) To any person operating the aircraft under the terms of any rental agreement or training program which provides any remuneration to the Named Insured for the use of said aircraft."

Hence, the first inquiry concerns the identity of the persons who come within the class of "insured".

But the identity of the insured is not the only aspect to be considered. The circumstances of the flight are also important. For this purpose the applicant informed the company as to the kind of flight and the identity of the pilots to be permitted. This information was incorporated into the policy by checking certain items in the Declarations and by attaching a printed form of endorsement (No. 3) containing a typewritten statement of permitted uses pertinent to student instruction. The policy further provides that it "does not apply" to an occurrence or to a pilot not stipulated.

The two concepts—the identity of the insured and the circumstances of the flight—are separate and independent of each other. They need not be similar in content or meaning. The insurance company may be willing to enlarge the term "insured" in certain respects but on the other hand, it may place other and different limitations on the use of the aircraft. If this distinction is not kept in mind, hopeless confusion in construing the contract must necessarily follow.

This distinction is explained in *Farm Bureau Ins. Co. v. Daniel*, 104 F. 2d 477 (4th Circ.) The Farm Bureau sought declaratory judgment that its policy did not cover claims for death resulting from the negligent operation of the insured Ford truck. From an adverse judgment in the District Court the insurance company appealed. The Court of Appeals reversed.

The policy—as in the case at bar—provided that it should apply only to accidents which should occur while the truck was being used for the purposes stated in the declarations. (p. 478.) The declarations identified these purposes as "hauling auto parts, building material and farm produce".(id.)

The Ford was driven to the scene of an automobile wreck and certain articles taken from the wreck were loaded on the Ford. On the return trip two men were killed as the result of the driver's negligence. (pp. 478-9.)

Thus, the use of the Ford was one which was not permitted by the insurance policy.

But the contention—which prevailed in the District Court—was advanced "that the truck was covered at the

time of the accident by reason of the definition of the insured contained in paragraph III of the insuring agreements of the policy''. (p. 479.) The Court of Appeals quotes ''this so-called omnibus clause'' which extended protection ''not only to the named insured but also to any person while using the automobile and any person or organization legally responsible for the use thereof, provided that the declared and actual use of the automobile is 'pleasure and business' or 'commercial', each as defined herein, and provided further that the actual use was with the permission of the named insured''. (id.)

The court rejected this contention and reversed, holding:

> The primary function of the omnibus clause was not to define the purposes to which the car was to be put, but to state the conditions under which the coverage would be extended to include not only the named insured, but also other persons while using the car with the permission of the insured.
>
> (p. 479.)

Incidentally, the court also held that ''the terms of the policy were not ambiguous, and therefore we have no occasion to consider the conflicting testimony, which was taken in the District Court, as to the purposes for which the policy was issued''. (id.)

To the same effect is *Standard Surety Co. v. Maryland Cas. Co.*, 119 N.Y. Supp. 2d 795, where the Appellate Division held:

> The exclusion clause is concerned with the hazards to which the policy did not apply and it should be interpreted in terms of the injuries to be excluded,

> not in terms of the persons who are to be indemnified. This latter consideration is the concern of policy clause entitled "Definition of 'Insured'."
>
> (p. 799.)

The instances in which the courts have been called upon to preserve the distinction between the "insured" clause and the "use" clause are infrequent. The reason may be that this distinction has not been controverted until the point arose in *Petro v. Ohio Cas. Co.*, 95 F. Supp. 59 (S.D. Cal.) on which the decision in the case at bar is based. Neither the opinion in *Petro* nor that at bar cites any case in support of the theory that the two clauses must be construed together. The decisions will be discussed below.

2. Clark was operating the aircraft under the terms of a training program which provided remuneration to Forhart for the use of the aircraft.

The "Named Insured" in this policy is, of course, Forhart who purchased the insurance. But it is provided that the category of insured may be extended to others. (Insuring Agreements, paragraph III.) This is an enlargement as the result of which persons may be covered even though they are strangers to the contract. But there is a limit to this indulgence. It does not apply to pilots under a training program.

"Training program" means a course of training. The person engaged therein is a trainee. Training is defined as

> An act or process, by means of drill, practice, etc., of becoming proficient in some art, or prepared for a test or contest, especially of physical skill or prowess;

> the systematic development of one's strength and ability; practice; exercise . . .
>
> Webster's New International Dictionary.

Defendant's exhibit No. 8 is a statement signed by Clark. It contains the following:

> Under the instruction flight training mentioned above by saying that the solo flight training was under the direction of the instructor. I mean that the instructor gave instructions and direction before the take off.

Clark's use of the word "training" is significant. The word is one used in common speech.

To be sure, when the insurance company served requests for admissions Clark in his response stated:

> I was never engaged in any "training program" with Al Forhart, and there was never any "training program" with him, as I understand the words "training program" to mean.
>
> (T.R. 39:14-16.)

Of course, Clark's understanding of the meaning of the words is not determinative. The remainder of his response demonstrates that he was taking a course of instruction and paying for it. He says:

> I entered into an agreement with Al Forhart for instruction leading to my qualifying for a commercial license, which contemplated some hours of dual time flying with Forhart, and many hours of solo time flying without Forhart, until I accumulated enough of both dual hours, and solo hours, to procure my commercial license. Prior to July 26, 1960, I had

paid to Al Forhart of the Forhart Flying Service the sum of $1,500 for the foregoing purpose.
(T.R. 39:18-25.)

This is an apt description of a training program.

There is nothing technical about these words. They are the kind of words which are customarily used in ordinary expression of ideas. The dictionary is the most reliable source of information as to their meaning. As the court held in *Mass. Mut. Life Ins. Co. v. Pistolesi*, 160 F. 2d 668 (9th), the words of all insurance policies are construed in their ordinary and popular sense and the opinion relies on the dictionary definitions of the words of the policy before the court. (p. 669.) That was a California case. But the principle is universal.

A dictionary definition was quoted in a case involving the definition of insured in an aircraft policy—*Insurance Co. of North America v. General Aviation Supply Co.*, 283 F. 2d 590 (C.A. 8th). There in enlarging the scope of the definition of "insured" the policy provided that the insurance with respect to any person other than the named insured does not apply to ". . . any aviation sales or service or repair organization". This is similar to subparagraph (c) of paragraph III of Forhart's policy. The question in the case in the eighth circuit was whether the foregoing description applied to a person who "sells aircraft supplies and equipment" but does not engage in the business of the sale of aircraft, or service or repair of aircraft. The District Court held that the sale of aircraft supplies and equipment did not come within the prohibited activity. The opinion of the Court of Appeals quotes the

dictionary definition of "aviation". It held that the term "aviation sales organization" did not describe the business of the plaintiff in the action who sought to establish coverage.

The learned District Judge in the case at bar ruled that "Standard dictionaries give no aid in" the "application" of the words "training program". (T.R. 51.) Yet he cited the General Aviation Supply case (footnote 7, T.R. 53) which—as we have seen—indicates otherwise.

Judge Jameson suggests that the insurance company was delinquent because it "did not offer any evidence with respect to the meaning of the words 'training program' as used in aircraft policies". (T.R. 52.) The answer is that no such evidence was necessary and that a judge (in the absence of a jury) would be justified in assuring counsel that he was as capable of comprehending the meaning of the term as any expert in philology.

The fundamental fallacy of the decision is the failure to recognize the different functions served by the omnibus clause defining the scope of those insured and the use clause limiting the uses of the aircraft to which the policy applies. (See section 1, supra.) In this respect the decision approves and follows *Petro v. Ohio Cas. Co.*, 95 F. Supp. 59, although Judge Jameson concedes that the omnibus clause in *Petro* differs from that at bar. (See footnote 10 to opinion, T.R. 54).[2]

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[2]The omnibus clause in *Petro* did not contain the words "training program". It provided that "insured" did not apply to a "student pilot". Brown, the pilot who flew the plane, held a private license and was taking instructions in order to obtain a commercial license.

Judge Yankwich held that "student pilot" was "clearly intended to apply to persons who take their first instructions before they secure any license which entitles them to operate a plane". (p. 63.) This ended the case. Brown was an insured and the Ohio Casualty Co. was liable for his negligence. No contention was made by the Ohio Co. that the use of the plane was not within the permissive clause of the policy.

Hence, there was no occasion for comparing the "insured" clause with the "use" clause and the comments of Judge Yankwich on this subject may be regarded as dictum. But Judge Jameson adopts this dictum and applies it to the case at bar, thus failing to realize that the two clauses serve different functions and that an insurance company may be willing to permit the operation of the plane by specified persons and to protect its customer accordingly, but on the other hand may not be willing to extend the category of "insured" to those other persons. There is no reason why an insurance company cannot say in its policy: "We will pay any liability on the part of the person who bought and paid for this insurance even though a trainee under program is operating the plane, but we will not defend the trainee or pay any judgment against him on account of his negligence".

Judge Jameson compares the two clauses in the policy at bar and because they do not use identical terms he emasculates the provision which refuses to extend the omnibus clause to a pilot under a training program. (T.R. 53.)

Judge Jameson points to the provision in the Declarations which permits use of the plane for "student instruc-

tion.'' He concludes that if the insurance company ''intended to except Forhart's students'' from the category of ''insured'', it ''should have referred to 'student instruction' ''. (T.R. 53.)

There is ample reason for not using the words ''student instruction'' in the omnibus clause. In *Petro* (95 F. Supp. 59) Judge Yankwich had decided that a pilot who is receiving instruction to improve his status is not a student.[3] The advisable course was to avoid a repetition of this result. The words ''training program'' accomplished this. Furthermore, Endorsement No. 3 (permitting use by pilots under instruction) expressly provides:

> Nothing herein contained shall vary, alter, waive or extend any of the terms, representations, conditions or agreements of the Policy other than as above stated.

Hence, the use clause cannot impair the effect of the omnibus clause.

Judge Jameson suggests (T.R. 52-3) that ''training program'' as used in the policy could mean either ''a course of instruction for an individual student'' or ''a formal instruction program sponsored by a federal or state agency''.

Forhart's planes could not possibly be used in connection with an official program of instruction. Except for the military service the only civilian activity involves the Civil Air Patrol. (36 U.S.C.A. § 201, et seq.) This is a volunteer civilian auxiliary of the Air Force and the Sec-

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[3]This ruling is open to doubt. The word "student" is not limited to a novice. No matter how far advanced a person may be, he is still a student when receiving instruction; e.g. a graduate student.

retary of Defense may provide government property, including aircraft and airports, for this purpose and provide training aids. (10 U.S.C.A. § 9441.)

Obviously, Forhart was not a participant in this activity and there could be no conceivable basis for excluding it from the scope of the omnibus clause.

Judge Jameson also refers to the "Civilian Pilot Training Program" involved in *LeBlanc v. Am. Ins. Co.*, 155 F. 2d 969 (5th Cir.) and suggests that such a program might be the one contemplated in the policy at bar. (T.R. 52-3.) The answer is that this was a Louisiana institution created by a 1930 act of the state legislature which no longer exists.

However, even if there were two different kinds of training programs, both would be excluded. The insured clause is not applicable to *any* person engaged in *any* training program. In *Lambert v. N.E. Fire Ins. Co.*, 148 Me. 60, 90 Atl. 2d 451 an automobile policy provided:

> This policy does not apply; . . . (h) under coverages D, E, F, G, H, I and J while the automobile is subject to any bailment lease, conditional sale, mortgage or other encumbrance not specifically declared and described in this policy.
>
> (p. 453.)

Lambert contended that this provision concerned only encumbrances in existence at the time of the issuance of the policy and not to one placed on the vehicle after issuance. This contention was rejected in the trial court. A non-suit was granted. The Supreme Judicial Court affirmed. The decision is stated in the syllabus as follows:

> (5) In construing combination automobile insurance policy, providing that "policy does not apply; * * * while automobile is subject to any * * * mortgage or other encumbrance not specifically declared or described in this policy", word "while" was an adverbial modifier meaning "as long as", and word *"any"* meant *"all or every"*, and where owner of truck created a valid, subsisting encumbrance on truck after issuance of policy, insurer was not liable for destruction of the truck by fire. (Italics supplied.)
>
> (p. 451.)

According to the decision below the exclusion applies to neither of the two kinds of hypothetical training programs. In other words, "any" means "none". The rule of strict construction against insurance companies does not go to such an extremity.

Judge Jameson says: "Most of plaintiff's contentions boil down to one, i.e., that only Forhart was insured by the policy. If in fact this was intended, it would have been very simple to insert the provision, 'Al Forhart (named as Al Forhart Flying Service) is the only person insured by this policy', or words to that effect." (T.R. 54.)

In the first place this is not a correct analysis of the policy and the company advances no such contention. A casual student—with or without pay—would not be engaged in a "program". He would be an insured and if he made a flight under an instructor's supervision, the flight would be a permitted use. Likewise, even in the instance of a course of instruction if no remuneration is paid, the student would be an insured.

Also, if either Forhart or any of the pilots above mentioned were at the controls, an occupant of the plane while in flight or after landing would be an insured and covered in the event that his negligence was the cause of injury to persons or damage to property.

Furthermore, the effect of the policy was for Forhart to decide. The omnibus clause gave wide latitude to the word "insured". If Forhart chose to limit the use of the plane, that was his privilege. Strangers to the contract have no right to complain.

The testimony shows that Forhart's purpose was to protect himself. He got what he wanted.

3. The theory that every conceivable doubt must be resolved against the insurance company has no application in the case of a third party who seeks to insinuate himself into the category of those insured under the policy.

As the foregoing argument demonstrates, the words "training program" are clear and unambiguous. They adequately describe Clark's activity. But let us assume the presence of some aspect of uncertainty so that if Forhart's financial interest were involved, a case would be presented for interpretation in his favor. This point is not essential to the decision in this case but the subject is one of possible accademic interest.

It makes no difference to Forhart whether or not Clark is held to be an insured. In Montana there is no vicarious liability on the part of the owner of an aircraft. The basis of the theory which calls for construction favorable to the policyholder is that the company adopts a printed form and its customer must take it or leave it.

But a prospective participant in a future training program is not a party to the contract. There is no obligation on the part of the policyholder or the company to protect a stranger's interest. He pays no premium. Consequently, he should be required to show that on the basis of a fair and reasonable analysis of the policy, he is included as an insured. Only in that case should he enjoy free coverage.

The situation would be different if the named insured is subjected to a claim for damages on the part of a third person. There it would be to the interest of the policyholder that the contract be held to apply to the circumstances under which the damage is inflicted. Hence, such a third party claimant may be entitled to invoke the rule of liberal construction.

But the case at bar is altogether different. There is no evidence that Forhart was seeking protection for others than himself. He wanted complete coverage for himself. That is what he received.

4. **A flight involving a landing at a distant airport and an attempt to take off with three passengers without the knowledge of the instructor is not under his direct supervision and control.**

It should first be noted that with respect to the permissive use clause this is not a "take it or leave it" situation. It is not a case in which the insured is not permitted "to have a voice in the drawing of his own contract". (*Montana Auto. v. British Underwriters,* 72 Mont. 69, 232 P. 198, 200.) On the contrary, the contemplated uses were the subject of bargaining before the risk was accepted. (See exchange of telegrams, exhibits A to

D and F, T.R. 29-32; 36; also testimony of Lynch (R. 9:18-20; 11:22-7; 12:20-26; 15-16); also Forhart's application (T.R. 35) containing a schedule of "Purposes for which aircraft will be used".) The use clause was specially prepared to accommodate Forhart's requirements. (See Declarations, item 6 and item 7 of which endorsement number 3 is a part.)

In the typical case the policy is construed against the insurance company because the insured must accept a printed form. In the case at bar the reason for this rule does not exist. Hence, the rule cannot apply.

But no matter how far a court may lean in an effort to bring Clark's flight within the scope of the permitted use, by no stretch of reasoning can it be regarded as under Forhart's "direct supervision and control".

The record on the subject of Forhart's connection with the flight appears in Clark's testimony and his responses to requests for admission. He testified:

> Q. In connection with taking that trip, you called Mr. Forhart and asked him if the plane was available?
>
> A. Yes.
>
> (R. 27:22-4.)
>
> * * * * * * *
>
> Q. Did you advise Mr. Forhart what you had planned to do at all in Red Lodge?
>
> A. I don't recall going into detail on that.
>
> Q. Did you advise him that you were going up there for any specific purpose other than that of getting time in the aircraft?
>
> A. As I recall I told him I had an opportunity to go to Red Lodge and would like to get a little flying time in if the plane was available.

Q. But you did not advise him what, if anything, you were going to do in Red Lodge?

A. No.

Q. You did not advise him you intended to fly a passenger or any particular number of passengers back from Red Lodge?

A. I did not know it myself at that time.

(R. 28:2-16.)

* * * * * * *

Q. Had you ever received any instruction from your instructor either verbally or in flight for taking an aircraft off with this load under the weather conditions and air density that were evident at that time?

A. When I called Mr. Forhart to get permission to use the plane there was a little discussion like it says in the statement about that.

Q. Well, did you receive any instruction from him at all, or any advice from him at all with respect to an operation of an aircraft at this height with this load?

A. I did not say anything about the load, of course, because I did not know how many people I was going to carry. I did not know myself. But he did mention about that the air was thinner at that altitude, to be careful of that.

(R. 31:21-32:7.)

Clark's admissions contain the following:

On July 26, 1960, in the afternoon I called Al Forhart and told him that I wanted to get in some more flying time and that I had in mind going to Red Lodge. He said that the Cessna was available and would be ready.

The conversation about Red Lodge was very brief. I knew the altitude there and had landed on that field

before. He didn't say anything about that. The only thing he had to say was that the weather was okay, and that was apparent.

(T.R. 40:6-14.)

The words "direct supervision and control" may require that the aircraft remain under continuous observation of the instructor. Otherwise, how can the latter have any idea as to the manner in which the craft is being flown? If it sufficed for the trainee to notify the instructor of his destination and obtain permission to fly, then a flight of six hundred miles instead of sixty—here involved—would be permissible. Considering the speed of aircraft there would be no limit to the length of the flight.

Nor can mere permission on the part of Forhart suffice. The policy does not make him the arbiter of what "direct supervision and control" means. He cannot dispense with its provisions and create a situation of supervision and control by authorizing Clark to use the plane and then go about his business.

But it is unnecessary to draw so fine a line in order to demonstrate that the use here was not within the permissive clause. Here there is one determinative fact—Forhart did not have the slightest intimation that Clark would endeavor to fly with three passengers thus involving almost the maximum load capacity of the plane. How could Forhart supervise and control an operation of which he was utterly ignorant?[4] The determinative issue is not whether Clark was competent to take off with three pas-

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[4]Charles Lynch, the operator of a flying service, whose company sold the plane to Forhart and who procured the issuance of this policy testified that "it is generally considered in the industry that when a pilot obtains permission from his instructor to fly solo that he is under the supervision of the instructor when

sengers—something he had never done before (R. 28:21-5) —nor whether Forhart would have approved the flight if he had been apprised. The question is: Did Forhart have direct supervision and control of the flight? Clearly, the answer is that he did not.

The fact that the Sheffields and Madsen have sued for personal injuries and that Lew Chevrolet Co. seeks to hold the insurance company responsible demonstrates that Clark is being charged with negligence. If Forhart had been in control of the flight he would have had an opportunity to avoid the catastrophe. This was the reason for the provision in the policy requiring direct supervision and control. The insurance company stipulated for this protection and on that basis calculated the element of risk and charged a premium accordingly. There is no conceivable ground for imposing on the insurance company the consequences of Clark's incompetence so as to relieve him and the Chevrolet Co. of liability. This was not what Forhart bargained for nor what the policy provides.

It may be—as the opinion of the trial judge states (T.R. 43)—that "it is important, in order to obtain a commercial license, that the pilot experience flying with a plane-load of passengers so that he may establish ability in that respect". But it is infinitely more important to the security of such passengers, who occupy the status of guinea pigs, that the instructor be on hand to provide the necessary counsel as to the technique of take-off under the prevailing conditions of weather, turbulence and load-capacity.

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he gets permission to take the aircraft alone" (R. 19:1-6). Assuming that the attitude of the "industry" could be binding on the courts, this is a far cry from taking on three passengers at a distant airport.

Witness Lynch testified:

> Q. And it is important in order to obtain a commercial license that the pilot experience carrying a full load of passengers, isn't it?
>
> A. Yes, the F. A. recommends that under the supervision of the instructor that that ability be established.
>
> (R. 18:22-26)

Assuming the existence of such a recommendation, it includes the requirement of "supervision of the instructor". But regardless of what the Federal Agency may recommend the determinative factor here is what the insurance policy requires.

With due deference we submit that the decision below leads to an absurdity. For the purpose of bringing Clark's flight into the permitted area the District Court obliterates its business aspect and holds that Clark was engaged in an instructional venture under Forhart's direct supervision and control. But on the other hand, for the purpose of imposing on the insurance company the liability of Lew Chevrolet Co. to pay for the Sheffields' injuries, the District Court holds that Clark was making a business flight and was acting within the scope of his employment by Lew Chevrolet Co.

From the argument above set forth the conclusion inevitably follows that Clark's use of the plane was not within those set forth in the declarations and therefore, it was squarely within the provision that

> "This policy does not apply: . . . 2. To any occurrence or to any loss or damage occurring while the aircraft is operated, while in flight, by other than the pilot or pilots set forth under item 7 of the Declarations."

5. Clark was engaged in a business flight—an activity which was permitted solely to Forhart.

Endorsement number 3 (incorporated into item 7 of the Declarations) authorizes flight under direct supervision and control of the instructor. It also permits Forhart to operate the plane for purposes of business. It does not permit a student—whether elementary or advanced—to use the plane for business purposes.

The learned District Judge holds that Clark's flight was for the purpose of instruction and had "as its incident" a "business purpose". (T.R. 49.) The answer is that the motivating reason for the flight was to solicit the sale of an automobile. The opinion below concedes that "Clark would have made the 60 mile trip to Red Lodge in any event" and that "the trip could easily have been made by automobile". (T.R. 48.) Hence, Clark's purpose to "put in some flight time" (op. T.R. 49) was incidental, just as a desire for exercise would have been incidental if he had walked to Red Lodge.

6. Such adjustment as the insurance company has chosen to make with its named insured cannot bar it from relying on the non-permitted use of the plane.

Not content with their effort to obtain gratuitous inclusion as "insured" under Forhart's policy, the Lew Chevrolet Co., Clark and the other defendants endeavor to participate in the indulgences which—they assert—the insurance company has granted to its paying customer in accepting coverage for him and dismissing him with prejudice. (Op. T.R. 55)[6]

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[6]Judge Jameson expressed doubt as to the validity of this contention but did not decide the point. (T.R. 55-6)

There are several answers to this contention. First: The company had the right to make such adjustment with Forhart—whether for goodwill or other reasons—as it saw fit. Outsiders cannot demand similar concessions. The defendants were not parties to this transaction. Assuming that there was a waiver, it would not be available to them.

In *Gerard v. Sander,* 110 Mont. 71, 103 P. 2d 314, the court said:

> "Waiver" has been well defined and this court in *Northwestern F & M. Ins. Co. v. Pollard,* 74 Mont. 142, 238 P. 594, 596, sets out the essential elements. Waiver requires two parties—one party waiving the right, and another receiving the benefit of such waiver. "Waiver must be manifested in some unequivocal manner, and to operate as such it must in all cases be intentional. There can be no waiver unless so intended by one party and so understood by the other." *Northwestern F & M. Ins. Co. v. Pollard,* supra; see, also, *Mundt v. Mallon,* 106 Mont. 242, 76 P. 2d 326.
>
> (p. 318)

Second: Dismissal of the suit as against Forhart merely bars the insurance company from seeking declaratory relief against him. It does not constitute a determination of any liability on the part of the company.

Third: The sole interest of Forhart arising out of this occurrence involved the damage to his plane. There is no vicarious liability in Montana on the part of an owner. Therefore, Forhart was not responsible for the personal injuries resulting from the crash. As to the material

damage to the plane, the insurance company was liable even though it was being operated for a non-permitted use. The plane was mortgaged to a bank which was the loss payee under the policy. Under Endorsement Number 1 (Breach of Warranty Endorsement) the bank was entitled to collect substantially the entire amount of the insurance regardless of any "breach" of "the policy provisions". Hence, the plane was covered and the company had no alternative but to accept coverage and the dismissal as to Forhart had no legal significance.

7. Conclusion.

It is respectfully submitted that the judgment should be reversed.

Dated: December 18, 1963.

Respectfully submitted,

David Livingston,

Attorney for Appellant.

Certificate

I certify that, in connection with the preparation of this brief, I have examined rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

David Livingston,

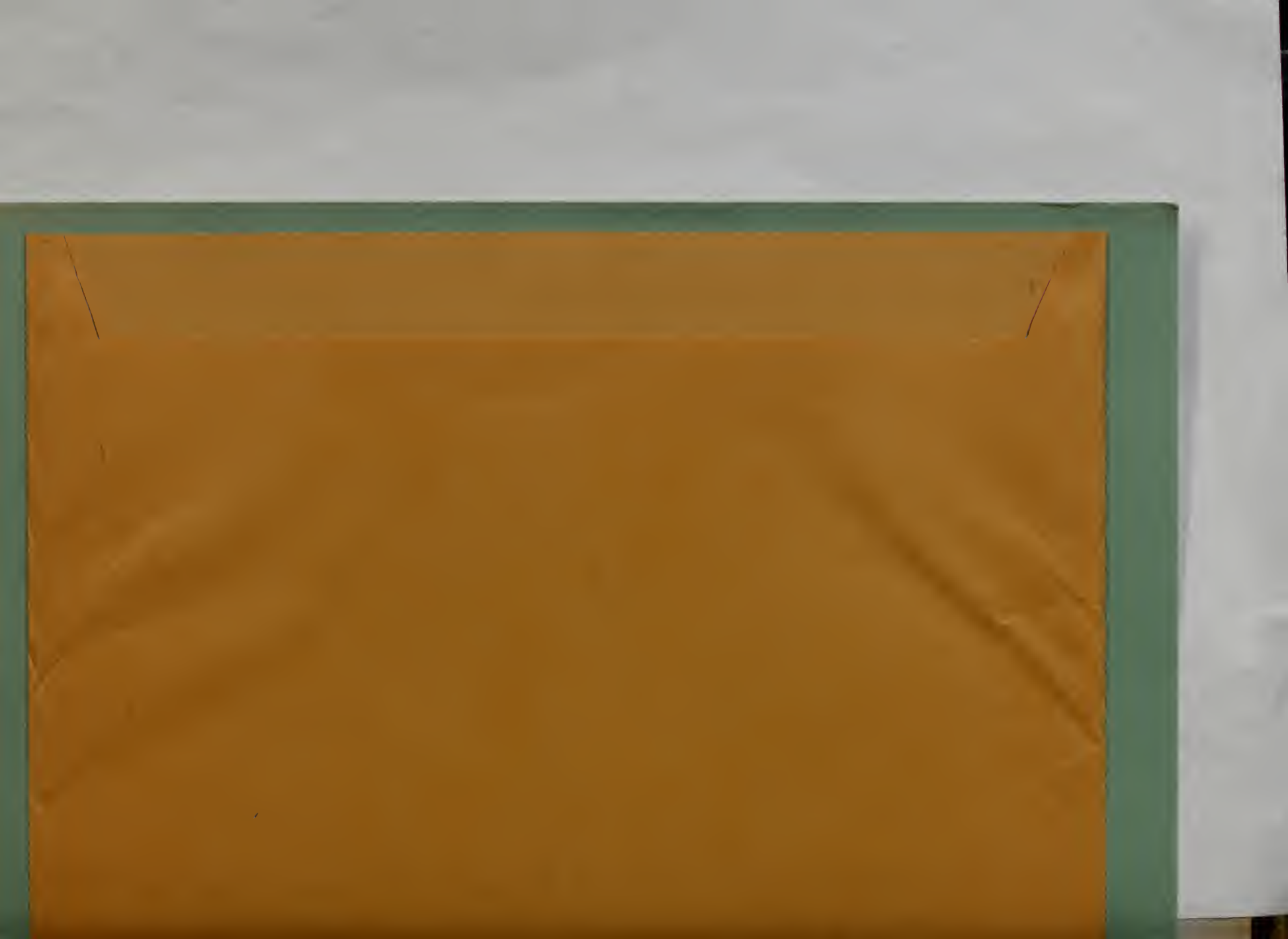
Attorney for Appellant.

(Appendix Follows)

Appendix.

Appendix

Schedule of Exhibits:	Reference to Record	
Exhibit No. 1—Policy	T.R. Vol. 1	p. 21
Exhibit No. 2—Telegram	T.R. Vol. 1	pp. 21, 29
Exhibit No. 3—Telegram	T.R. Vol. 1	pp. 22, 30
Exhibit No. 4—Telegram	T.R. Vol. 1	pp. 22, 31
Exhibit No. 5—Telegram	T.R. Vol. 1	pp. 22, 32
Exhibit No. 6—Pilot rating application	T.R. Vol. 1	pp. 22, 33-5
Exhibit No. 7—Telegram	T.R. Vol. 1	pp. 22, 36
Exhibit No. 8—Statement of Clark	T.R. Vol. 1	p. 22
Exhibit No. 9—Copy of letter	T.R. Vol. 1	p. 22
Exhibit No. 10—Response of defendant Madsen	T.R. Vol. 2	pp. 3-4



COMBINATION AIRCRAFT POLICY

No. AC-[redacted] 6611

THIS HEREBY CERTIFIES THAT THIS IS A TRUE AND CORRECT COPY OF POLICY

KANSAS CITY FIRE & MARINE

KANSAS CITY, MISSOURI

Insurance Company

301 WEST 11TH STREET

KANSAS [redacted]

Issued Through AMERICAN AVIATION UNDERWRITERS

P. O. BOX 1660, HOUSTON 1, TEXAS • 234 BUSH STREET, SAN FRANCISCO 4, CALIF.
3540 WILSHIRE BLVD., LOS ANGELES 5, CALIF.

DECLARATIONS

Item 1. Name of Insured and Address: AL FORHART FLYING SERVICE
938 CUSTER AVENUE
BILLINGS, MONTANA

Item 2. The policy period shall be from APRIL 3, 1960 to APRIL 3, 1961
12:01 A. M. Standard Time at the address of the Named Insured as stated herein.

Item 3. The aircraft will be principally hangared in the above town and state, unless otherwise stated herein:* _____

Item 4. The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the Company's liability against each such coverage shall be as stated herein, subject to all of the terms of this Policy having reference thereto. When two or more aircraft are insured hereunder, the terms of this Policy shall apply separately to each.

	PREMIUMS	LIMITS OF LIABILITY	COVERAGES
A.	$ 66.24	$ 50 ,000 Each Person; $ 100 ,000 Each Occurrence	Bodily Injury Liability EX cluding Passengers
B.	$ 250.00	$ 50 ,000 Each Person ———	Passenger Bodily Injury Liability
C.	$ 67.20	——— $ 50 ,000 Each Occurrence	Property Damage Liability
D.			Single Limit Bodily Injury and Property Dam-

Optional Coverage Form (Applies to Coverages F, G, & H only)

APPLICABLE TO N-7755-T ONLY
AMOUNT OF ENCUMBRANCE $ 8,000.00

BREACH OF WARRANTY ENDORSEMENT

In consideration of an additional premium of $ 40.00 (INCLUDED & EARNED), it is hereby understood and agreed that loss, if any, under Coverages F, G, or H of the undermentioned Policy shall be payable to SECURITY TRUST AND SAVINGS BANK BILLINGS, MONTANA Mortgagee, as interest may appear.

Coverages F, G, and H of said policy, as to the interest therein of the mortgagee only, shall not be invalidated by any act, omission, or neglect of the Insured which shall constitute a breach of warranty or policy condition; PROVIDED, that in the event the Insured shall fail to pay any premium due under said policy, the mortgagee shall, on demand, pay the same.

PROVIDED ALSO, that the mortgagee shall notify the Company of any change of ownership or increase of hazard or breach of warranty or policy condition which shall come to the knowledge of said mortgagee and, unless permitted by said policy, it shall be noted thereon and the mortgagee shall, on demand, pay the premium for such increased hazard; otherwise, the undermentioned policy shall be null and void.

Whenever the Company shall pay the mortgagee any sum for loss or damage under the undermentioned policy and shall claim that, as to the Insured, no liability therefor existed, the Company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the mortgagee against the Insured in and to all the property held as security for the indebtedness; or the Company may, at its option, pay the said mortgagee the whole amount due or to become due from the Insured, with interest, and shall thereupon be entitled to receive a full assignment and transfer of all rights of the said mortgagee against the Insured and of all property held as security for the indebtedness.

Nothing herein contained shall vary, alter, waive or extend any of the terms, representations, conditions or agreements of the Policy other than as above stated.

To be attached to and form a part of Policy No. AC 6611

issued to AL FORHART FLYING SERVICE by

KANSAS CITY FIRE & MARINE INSURANCE COMPANY

This endorsement effective APRIL 3, 1960

C. J. CARROLL AGENCY

By [signature] Authorized Representative

Morton T. Jones
President

AVI-33

Endorsement No. 1

SCHEDULE OF AIRCRAFT AND COVERAGE

Item No.	C.A.A. Certificate No.	Make and Model of Aircraft	Pass. Cap. Ex. Crew
1.	N-7755-T	1960 CESSNA 172	3
2.	N-37261	1944 INTERSTATE CADET	1
3.			
4.			
5.			
6.			
7.			
8.			
9.			
10.			

The Limits of Liability as respects Coverages A, B, C, D, and E shall be as stated in the Declarations of the undermentioned Policy and the Limits of Liability as respects Coverages F, G, and H shall be as stated below, subject to all of the terms and conditions of said Policy having reference thereto:

LIMITS OF LIABILITY — COVERAGES F, G, AND H

Item No.	Coverage F			Coverage G			Coverage H		
1.	$ 10,000.00	Less $ 250.00	Ded.	$ 10,000.00	Less $ 500.00	Ded.	$ 10,000.00	Less $ 500.00	Ded.
2.	$ NIL	Less $	Ded.	$ NIL	Less $	Ded.	$ NIL	Less $	Ded.
3.	$	Less $	Ded.	$	Less $	Ded.	$	Less $	Ded.
4.	$	Less $	Ded.	$	Less $	Ded.	$	Less $	Ded.
5.	$	Less $	Ded.	$	Less $	Ded.	$	Less $	Ded.
6.	$	Less $	Ded.	$	Less $	Ded.	$	Less $	Ded.
7.	$	Less $	Ded.	$	Less $	Ded.	$	Less $	Ded.
8.	$	Less $	Ded.	$	Less $	Ded.	$	Less $	Ded.
9.	$	Less $	Ded.	$	Less $	Ded.	$	Less $	Ded.
10.	$	Less $	Ded.	$	Less $	Ded.	$	Less $	Ded.

The insurance afforded is only with respect to such and so many of the following coverages as are indicated by the specific premium charge or charges as indicated below:

PREMIUM CHARGES

Item No.	Coverage A	Coverage B	Coverage C	Coverage D	Coverage E	Coverage F	Coverage G	Coverage H
1.	$ 33.12	$ 250.00	$ 33.60	$ NIL	$ NIL	$ 68.00	$ 54.00	$ 351.00
2.	$ 33.12	$ NIL	$ 33.60	$ NIL	$ NIL	$ NIL	$ NIL	$ NIL
3.	$	$	$	$	$	$	$	$
4.	$	$	$	$	$	$	$	$
5.	$	$	$	$	$	$	$	$
6.	$	$	$	$	$	$	$	$
7.	$	$	$	$	$	$	$	$
8.	$	$	$	$	$	$	$	$
9.	$	$	$	$	$	$	$	$

GENERAL ENDORSEMENT

IN CONSIDERATION OF THE PREMIUM AT WHICH THE UNDERMENTIONED POLICY IS WRITTEN IT IS HEREBY UNDERSTOOD AND AGREED THAT IN THE SPACE PROVIDED IN ITEM #7 OF THE UNDERMENTIONED POLICY DECLARATIONS THE FOLLOWING SHALL BE INSERTED:

A. WHILE THE AIRCRAFT IS BEING USED FOR PURPOSES OF STUDENT INSTRUCTION:

STUDENT PILOTS WHILE UNDER THE DIRECT SUPERVISION AND CONTROL OF A PROPERLY CERTIFICATED INSTRUCTOR PILOT.

B. WHILE THE AIRCRAFT IS BEING USED FOR PURPOSES OF BUSINESS AND PLEASURE AND TRANSPORTATION OF PASSENGERS FOR HIRE:

AL FORHART

Nothing herein contained shall vary, alter, waive or extend any of the terms, representations, conditions or agreements of the Policy other than as above stated.

To be attached to and form a part of Policy No. AC 6611

issued to AL FORHART FLYING SERVICE by

KANSAS CITY FIRE & MARINE INSURANCE COMPANY

This endorsement effective APRIL 3, 1960

G. J. CARROLL AGENCY

By J. Marshall
Authorized Representative

Morton T. Jones
President

FORM KCAC-6 6-54

Endorsement No. 3

CHANGE OF AIRCRAFT OR COVERAGE ENDORSEMENT

In consideration of AN ADDITIONAL premium of $ 444.98
(an additional or return)

..... Dollars, it is hereby understood and agreed that:

1. unless Limits of Liability are indicated in the appropriate column below for Coverages A, B, C, D or E, the Limit of the Company's liability shall be as stated in the Declarations of the undermentioned policy.

	LIMITS OF LIABILITY	COVERAGES		LIMITS OF LIABILITY	COVERAGES
A.	$,000 Each Person $,000 Each Occurrence	BODILY INJURY LIABILITY ....cluding Passengers	D.	$,000 Each Occurrence	SINGLE LIMIT BODILY INJURY AND PROPERTY DAMAGE LIABILITY ....cluding Passengers
B.	$,000 Each Person	PASSENGER BODILY INJURY LIABILITY			
C.	$,000 Each Occurrence	PROPERTY DAMAGE LIABILITY	E.	$,000 Each Person	MEDICAL PAYMENTS (....cluding Crew)

The Limit of Liability for the added aircraft under 2. hereof, if any, for Coverages F, G or H shall be as shown in the appropriate column below:

	LIMITS OF LIABILITY		COVERAGES		LIMITS OF LIABILITY		COVERAGES
Item (a):				Item (b):			
F.	$5,000	Less Ded. $ 125.00	ALL RISKS WHILE NOT IN MOTION	F.	$	Less Ded. $	ALL RISKS WHILE NOT IN MOTION
G.	$5,000	Less Ded. $ 250.00	ALL RISKS WHILE TAXIING	G.	$	Less Ded. $	ALL RISKS WHILE TAXIING
H.	$5,000	Less Ded. $ 250.00	ALL RISKS WHILE IN FLIGHT	H.	$	Less Ded. $	ALL RISKS WHILE IN FLIGHT

2. the undermentioned policy is extended to cover the following aircraft:

Item	C.A.A. Certificate No.	Make and Model of Aircraft	Pass. Cap. Ex. Crew	Date Coverage Attaches
(a)	N-2306-P	PIPER PA-22	3	5-5-60
(b)				

3. the undermentioned policy CEASES to cover the aircraft designated below by the insertion of (X):
   ( ) Described in the Declarations of the undermentioned policy.
   ( ) Described as Item(s) ..... of the Schedule of Aircraft and Coverage attached to the undermentioned policy.
   ( ) Described in Endorsement(s) No. ..... attached to the undermentioned policy.

4. Item 6, 7 or 8 is changed to read as follows: *

SEE ENDORSEMENT NUMBER 5

GENERAL ENDORSEMENT

IN CONSIDERATION OF THE REDUCED PREMIUM AT WHICH THE UNDER-MENTIONED POLICY IS WRITTEN IT IS HEREBY UNDERSTOOD AND AGREED THAT WITH RESPECT TO AIRCRAFT N-8306-P:

1. THE LIMITS OF LIABILITY WITH RESPECT TO COVERAGE AFFORDED UNDER B OF ITEM 4 OF THE DECLARATIONS SHALL BE AMENDED TO BE:

   $ 50,000 EACH PERSON $ 50,000 EACH OCCURRENCE

   EXCEPT THAT NO COVERAGE SHALL APPLY UNDER B OF ITEM 4 OF THE DECLARATIONS WHILE THERE ARE MORE THAN TWO (2) PERSONS (INCLUDING CREW) IN THE AIRCRAFT.

2. IN THE SPACE PROVIDED IN ITEM 8(A) OF THE DECLARATIONS THE FOLLOWING SHALL BE INSERTED:

   NEW WESTERN CREDIT CORP.
   P. O. BOX 836
   BILLINGS, MONTANA

3. THE PURPOSES FOR WHICH THE AIRCRAFT WILL BE USED WILL BE "PLEASURE AND BUSINESS" AS DEFINED IN ITEM 6 OF THE DECLARATIONS AND "SPECIAL USES". THE TERM "SPECIAL USES" IS DEFINED AS "STUDENT INSTRUCTION".

Optional Coverage Form (Applies to Coverages F, G, & H only)

BREACH OF WARRANTY ENDORSEMENT

In consideration of an additional premium of $ 18.00 (EARNED), it is hereby understood and agreed that loss, if any, under Coverages F, G, or H of the undermentioned Policy shall be payable to NEW WESTERN CREDIT CORP.
P. O. BOX 836, BILLINGS, MONTANA
Mortgagee, as interest may appear.

Coverages F, G, and H of said policy, as to the interest therein of the mortgagee only, shall not be invalidated by any act, omission, or neglect of the Insured which shall constitute a breach of warranty or policy condition; PROVIDED, that in the event the Insured shall fail to pay any premium due under said policy, the mortgagee shall, on demand, pay the same.

PROVIDED ALSO, that the mortgagee shall notify the Company of any change of ownership or increase of hazard or breach of warranty or policy condition which shall come to the knowledge of said mortgagee and, unless permitted by said policy, it shall be noted thereon and the mortgagee shall, on demand, pay the premium for such increased hazard; otherwise, the undermentioned policy shall be null and void.

Whenever the Company shall pay the mortgagee any sum for loss or damage under the undermentioned policy and shall claim that, as to the Insured, no liability therefor existed, the Company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the mortgagee against the Insured in and to all the property held as security for the indebtedness; or the Company may, at its option, pay the said mortgagee the whole amount due or to become due from the Insured, with interest, and shall thereupon be entitled to receive a full assignment and transfer of all rights of the said mortgagee against the Insured and of all property held as security for the indebtedness.

Nothing herein contained shall vary, alter, waive or extend any of the terms, representations, conditions or agreements of the Policy other than as above stated.

To be attached to and form a part of Policy No. AC 6611

issued to AL FORHART FLYING SERVICE by

This endorsement effective MAY 5, 1960 KANSAS CITY FIRE & MARINE INSURANCE COMPANY

C. J. [illegible] AGENCY

By [signature]
Authorized Representative

Morton T. Jones
President

AVI.33 5-11-60

Endorsement No. 6